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MATRIMONIAL PROPERTY

by

*Joseph W. McKnight**

THE MOST significant development in the field of matrimonial property law during the past year was the recodification and revision of chapters 2 and 3 of title 75 and related articles.[1] The legislature also expanded the jurisdiction of domestic relations and juvenile courts to enable them to grant relief involving third parties in family disputes.[2] The matrimonial property statutes became effective January 1, 1968, and therefore do not affect the holding in any of the cases here discussed. Reference will be made to the new statutes if a contrary result might be achieved thereunder.

I. Characterization as Separate or Community Property

The inception of title doctrine, providing that the character of property is determined by the facts at the time of acquisition displayed continued resilience. In *Gulf Oil Corp. v. Shell Oil Co.*[3] the husband, during marriage, contracted to perform services in return for an interest in land. His wife died before the services were rendered and the question was whether the interest received by the husband was community property. The court held that since the husband's interest in the property had its inception in the contract executed during marriage, it was community property.[4]

In a case only casually noted last year[5] the Amarillo court held that Texas real property acquired by a husband was his separate property simply because of his residence in a common law state. As an alternative ground the court relied on the more prosaic reasoning that the property was separate because acquired by inheritance. Though it is probable that when a spouse who resides in a common law state acquires realty in Texas, he acquires it as his separate property, the fact of residence alone does not determine the nature of the property. Rather it is the character of the property used to acquire the Texas realty which determines the character of the property acquired.[6] It is important to note the correct rule

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[1] Tex. Laws 1967, ch. 309, § 1, at 735. For comments on the measure as proposed see McKnight, *Recodification of Matrimonial Property Law*, 29 Texas B.J. 1000 (1966).

[2] Tex. Rev. Civ. Stat. Ann. arts. 2338-3, 2338-7 - 2338-11a, 2338-13 - 2338-20 (Supp. 1967). A more ambitious enactment to make domestic relations and juvenile courts into ordinary district courts had been proposed. *See* Raggio, *Family District Courts*, 29 Texas B.J. 100 (1966).

[3] 410 S.W.2d 260 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[4] If a single man acquires a right to property on compliance with a contract and performance is completed after his marriage the property is his separate property. Welder v. Lambert, 91 Tex. 570, 44 S.W. 281 (1898); Bishop v. Williams, 223 S.W. 512 (Tex. Civ. App. 1920) *error ref.*

[5] Orr v. Pope, 400 S.W.2d 614 (Tex. Civ. App. 1966), *noted in* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 Sw. L.J. 39, 41 n.9 (1967). *See also* Buchschacher, *Rights of a Surviving Spouse in Texas in Marital Property Acquired While Domiciled Elsewhere*, 45 Texas L. Rev. 321 (1966).

[6] Blethen v. Bonner, 93 Tex. 141, 53 S.W. 1016 (1899); Oliver v. Robertson, 41 Tex. 422 (1874).

since the Eastland court faced a similar question recently and, while citing the correct rule, also cited the case decided by the Amarillo court without distinguishing the two.[7] The doctrine of residence used by the Amarillo court is a handy rule of thumb since residents of common law states usually have only separate property and therefore will use separate property to acquire Texas realty. It should not be elevated to a rule of law, however, because it is possible for spouses residing in a common law state to own property jointly, even community property, and if jointly-owned property is used by a resident of a common law state to purchase Texas realty, the property acquired would be joint property, regardless of the residence of the purchaser.[8]

The effect of a recital in the deed characterizing property as separate faced the court in *Messer v. Johnson*.[9] The realty was acquired during the marriage of the husband and his second wife. Title was taken in the name of the wife and recited that it was her sole and separate estate. The husband joined in the deed as grantor. At her death the wife's will provided that the husband would have a life estate in her realty. The remaindermen were her relatives. The husband filed suit against the relatives claiming that one-half of the property was his in fee simple since it was community property, despite the recital in the deed. Over objection, evidence was introduced to show that title had been taken in the wife's name as her separate property because the couple was afraid that in the event of the husband's death his son by a prior marriage might claim an interest in it. The jury found that the couple intended that the property be held by the wife for the community and awarded the husband's grantee (his third wife) a fee simple interest in the husband's community one-half and an estate *pur autre vie* for the husband's life in the other one-half. The Amarillo court of civil appeals affirmed. In reversing, the supreme court reconciled its 1952 holding in *Lindsay v. Clayman*[10] (a matrimonial property case) with its 1956 decision in *Jackson v. Hernandez*[11] (a non-matrimonial property case). In *Lindsay* the court refused to allow parol evidence to vary a recital that the property was taken as the wife's separate estate. The deed in that case also contained recitals that the money used to purchase the property was the wife's separate property and that payment was to be made from the wife's separate estate. In distinguishing *Lindsay*, the Amarillo court had held that evidence to rebut a recital in favor the wife's separate property is admissible if the recital is not contractual in nature, *i.e.*, if there is no recital that the wife's separate property had been, or would be, used to pay the purchase price.[12] As pointed out by the supreme court, however, "the real basis for the . . . rule . . . is the stipulation in the deed that the land was conveyed to the grantee as her separate property."[13]

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[7] Hall v. Tucker, 414 S.W.2d 766 (Tex. Civ. App. 1967) *error ref. n.r.e.*
[8] Huston v. Colonial Trust Co., 266 S.W.2d 231 (Tex. Civ. App. 1954) *error ref. n.r.e.*
[9] 11 Tex. Sup. Ct. J. 164 (1968).
[10] 151 Tex. 593, 254 S.W.2d 777 (1952). *See* note 14 *infra*.
[11] 155 Tex. 249, 285 S.W.2d 184 (1955).
[12] 415 S.W.2d 276, 280 (Tex. Civ. App. 1967).
[13] 11 Tex. Sup. Ct. J. 164, 166 (1968).

Therefore, the supreme court held that parol evidence of the intention of the husband and wife to hold the property as community was inadmissible.[14] A different situation arises when the deed is in the wife's name but with no recital as to whether it is her separate property. The property in the wife's name is presumed to be community property since acquired during marriage without a recitation that it was the wife's separate estate or without the requisite proof of gift.[15]

A factually related situation involving division of property upon divorce was dealt with by the Houston court.[16] In 1957, the wife, through a trustee, transferred securities to her husband. He, in turn, sold the securities and used the proceeds to make a down payment of one-half the purchase price for a tract of land. The other half of the purchase price was borrowed from a bank. The land-purchase contract was made between the seller and the husband alone. The deed was made to the husband as his separate property and recited that one-half the purchase price was paid with his separate property. There was no provision in the loan agreement with the bank, the land-purchase contract, or the purchase money note given by the husband for the unpaid balance that the creditor was to look to the husband's separate property for repayment. The unpaid balance was, however, secured by a vendor's lien and deed of trust on the property. The trial court determined that the land was the husband's separate property. The court of civil appeals reversed and remanded. It was the view of the court that, since the fairness and validity of the purported gift of the securities were questioned by the wife, the husband as a confidant (and an attorney) had the burden of showing fairness. If the validity of the gift is sustained on re-trial, the land would be one-half separate property of the husband and one-half community property since the husband's agreement to pay the unpaid balance was a community obligation. The wife was not barred by the statute of limitation from making her claim long after the fact, because she was a married woman during that time and the statute never began to run. The 1967 legislation terminates the protected status of married women over twenty-one under the statutes of limitation.[17]

Several cases concerned the community character of a recovery for personal injuries to the wife. In one case[18] the wife was denied recovery for injuries received as a passenger in a car driven by her husband because of

[14] *See* Fritz, *Marital Property—Effects of Recitals and Credit Purchases*, 41 TEXAS L. REV. 1 (1962); Young, *Parol Evidence and Texas Deeds*, 34 TEXAS L. REV. 351 (1956). If the husband should convey property to his wife as her separate estate with the intention of defrauding his creditors, two rules prevent any later attempts by him to regain the property even though the wife may have promised to reconvey it: (1) the husband is precluded from showing the agreement contrary to the unequivocal language of the deed, and (2) the husband is not allowed to recover because his act is in violation of TEX. BUS. & COMM. CODE § 24.02 (1967). McKnight, *Liability of Separate and Community Property for Obligations of Spouses to Strangers*, in CREDITORS RIGHTS IN TEXAS 330, 353-54 (McKnight ed. 1963). Letcher v. Letcher, 421 S.W.2d 162 (Tex. Civ. App. 1967) *error dismissed w.o.j.* In that case the husband conveyed property to his wife in anticipation that a personal injury judgment might be rendered against him. The action against him was ultimately dismissed. The case might, therefore, have been treated as an exception to the rule applied by the court. Rivera v. White, 94 Tex. 538, 63 S.W. 125 (1901).

[15] Kitchens v. Kitchens, 407 S.W.2d 300 (Tex. Civ. App. 1966).

[16] Bohn v. Bohn, 420 S.W.2d 165 (Tex. Civ. App. 1967) *error dismissed w.o.j.*

[17] TEX. REV. CIV. STAT. ANN. arts. 5518, 5535 (Supp. 1967).

[18] Blazek v. Haizlip, 413 S.W.2d 486 (Tex. Civ. App. 1967).

the husband's contributory negligence. It has been consistently held that if the recovery would be community property and the husband has been contributorily negligent in causing the injury, the husband's negligence is imputed to the wife. A contrary conclusion would allow the husband to share in the community recovery which was, in part, the result of his own wrong.[19] In *Firence Footwear Co. v. Campbell*[20] it is further stated that recovery for the wife's personal injury is community property subject to the husband's control. As general propositions of pre-1968 law, both of these statements are uncontestable. But it has long been thought that there is an inherent injustice in treating the physical loss of a spouse as community property insofar as the loss is not measured by earning power during marriage. In the 1917 revision of the matrimonial property statutes the legislature attempted to achieve this just result but failed.[21] As revised in 1967, article 4615[22] still provides, in effect, that recovery for lost earning power, which is commonly the principal element of a personal injury verdict, is community property. But recoveries for destruction or loss of a bodily limb, as measured by pain and suffering of the injured spouse as well as earning power lost before marriage or after the marriage is dissolved, are the separate property of the injured spouse. In addition, article 4621[23] provides that all types of recoveries for personal injuries are subject to the management, control and disposition of the person injured. The provisions of article 4615, dealing with ownership of the recovery, should be clearly distinguished from the management provisions of article 4621. Article 4615 does not make all recoveries the separate property of the injured spouse. Article 4621, on the other hand, does give the injured spouse management, control, and disposition over all of a personal injury recovery whether such recovery is community or separate property or both. Regardless of characterization of various aspects of personal injury recoveries as separate or community property, the injured spouse has the sole power to settle a dispute as to liability because of his or her management powers. But, proper utilization of the provisions of article 4615 on behalf of the injured spouse will call for great care in pleading, proof, submission and rendering judgment.

It may be anticipated that the statutory changes in article 4615 will affect the ability of a spouse to recover in the situation when recovery was previously denied because of the other spouse's contributory negligence. Previously the denial has been based on the impropriety of allowing a con-

[19] Dallas Ry. & Terminal Co. v. High, 129 Tex. 219, 103 S.W.2d 735 (1937); Ft. Worth C.R.G. Ry. v. Robertson, 103 Tex. 504, 121 S.W. 202 (1909); Wentzel v. Neurenbery, 314 S.W.2d 858 (Tex. Civ. App. 1958); Northern Tex. Traction Co. v. Hill, 297 S.W. 778 (Tex. Civ. App. 1927) *error ref.*; 1 O. SPEER, MARITAL RIGHTS IN TEXAS § 429 (1961); Annot., 110 A.L.R. 1099 (1937). *See also* Parks, *Lederle—A Vote for the Domicile Rule in Interspousal Conflicts Causes*, 18 BAYLOR L. REV. 477 (1966). *Note* that *Lederle* was dismissed *ab initio* by the supreme court, 9 Tex. Sup. Ct. J. 308 (1966).

[20] 411 S.W.2d 636 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[21] The statute was much too broadly drawn and has been construed as running afoul of the constitutional definition of matrimonial property in TEX. CONST. art. XVI, § 15. Northern Tex. Traction Co. v. Hill, 297 S.W. 778 (Tex. Civ. App. 1927) *error ref.*

[22] TEX. REV. CIV. STAT. ANN. art. 4615 (Supp. 1967).

[23] *Id.* art. 4621.

tributor to the injury to profit through a community interest in the recovery.[24] Now there is no reason to impute the negligence of one spouse to the other for that part of the recovery which under article 4615 will be the separate property of the injured spouse. A spouse therefore should be able to recover from the driver of the other car as any other guest could recover despite the contributory negligence of the driver of the car in which he or she was riding.[25]

The characterization of insurance proceeds has long been a problem in Texas. Though it was widely hoped that the 1963 decision of the supreme court in *Brown v. Lee*[26] would greatly diminish the incidence of characterization disputes, the courts are still grappling with peripheral problems in the field. In *Freedman v. United States*[27] the Court of Appeals for the Fifth Circuit held that one-half of the proceeds from a policy insuring the deceased wife were includable in her estate despite the fact that the husband, as the designated owner of the policy, had all incidents of ownership. The court based its decision on the holding in *Brown v. Lee* that the proceeds from life insurance purchased during marriage with community funds are community property. Though the wife in *Freedman* had agreed to the terms of the policy and her husband's ownership rights therein, an intention on her part to make a gift of her community interest was not shown.[28] Rather, the court found that the husband's control over the policy was due to his position as manager of the community. Apparently in such a situation an instrument of assignment or a deed of gift would be necessary to prove that a spouse had indeed made a gift of her interest.[29] Without such an instrument the proceeds will be included in the deceased spouse's estate to the extent of his or her community interest regardless of the fact that the other spouse has the right to exercise all incidents of ownership under the policy.[30]

In *McFarland v. Franklin Life Insurance Co.*[31] the supreme court put insurance companies on notice that protracted delay in paying insurance

[24] *See* Blazek v. Haizlip, 413 S.W.2d 486 (Tex. Civ. App. 1967).

[25] Robinson v. Ashner, 364 S.W.2d 223 (Tex. 1963). *See also*, Note, 9 So. TEX. L.J. 227 (1967).

[26] 371 S.W.2d 694 (Tex. 1963).

[27] 382 F.2d 742 (5th Cir. 1967). *See also* French, *The Community Life Insurance Policy*, 18 BAYLOR L. REV. 627 (1966).

[28] Indeed the court questions the power of a Texas married woman to make a gift of community property over which she has no management power. 382 F.2d at 746 n.8, 747 n.10. The wife's executor seems to have relied on the now repealed provisions of TEX. REV. CIV. STAT. ANN. art. 4619 (1960) which provided that the wife has control of an insurance policy in her name. But this policy was in the husband's name. This article is replaced by the general terms of TEX. REV. CIV. STAT. ANN. art. 4622 (Supp. 1967) and TEX. INS. CODE ANN. art. 3.49-3 (Supp. 1967).

[29] 382 F.2d at 747 n.10. But if the policy is community property subject to the husband's management, the wife has no management powers except for purposes of succession in which case her assignment or deed of gift should be executed with the formalities required for a will.

[30] Other tax problems arise under Rev. Rul. 67-463, 1967 INT. REV. BULL. No. 52, at 15 where the service takes the position that if the husband makes a gift to the wife so that she can make the premium payments on his death, all proceeds are includable in his estate. Partition of the community estate under TEX. REV. CIV. STAT. ANN. art. 4624a (Supp. 1967) to make separate property available to make premium payments may solve this problem. *See* Rev. Rul. 67-228, 1967 INT. REV. BULL. No. 29, at 20; Scott v. Commissioner, 43 T.C. 920, 374 F.2d 154 (9th Cir. 1967); Rev. Rul. 67-278, 1967 INT. REV. BULL. No. 35, at 14.

[31] 416 S.W.2d 378 (Tex. 1967). For further discussion, see Davis, *Insurance Law*, this *Survey*, at footnote 50.

proceeds on the assertion that rival claimants exist will not be tolerated when the other claims are based on unasserted or specious community property interests. There the father took out a policy on the life of his son when the son was about nine years old; the father was named as beneficiary and the mother as contingent beneficiary. The father predeceased his son. The son, at death, was survived by his widow and his mother. His mother claimed the insurance proceeds. After considerable correspondence with the insurance company running over four months' time, the company indicated, rather apologetically, an intention to pay. A month later the mother brought suit for the proceeds, the twelve per cent statutory penalty, attorney's fees and court costs under article 3.62 of the Insurance Code.[32] The company argued that it reasonably anticipated a dispute by the son's widow and was never informed by his mother that the community estate of the son and his wife was not used to pay premiums. Reversing a contrary holding by the El Paso court in favor of the company, the supreme court held that the company already knew that the widow would put forth no adverse claim and could have made an investigation during the thirty days allowed by article 3.62 to discover that the policy was taken out while the insured was unmarried and that premiums were paid by his parents.

In several divorce cases small points with respect to insurance proceeds were also at issue. In one[33] the Austin court held that the husband's disability insurance policies were part of the community estate and that payments being made pursuant thereto could properly be divided equally between the spouses, as they were paid in the future. The trial court, of course, could have divided these payments unequally and might have taken the personal loss of the husband into account in its discretionary power provided for by article 4639.[34]

II. Division on Divorce

There are several striking applications of the rule in *Rains v. Wheeler*,[35] where the supreme court held that spouses in anticipation of divorce might partition their existing community estate. This rule apparently has been extended to allow partition agreements to cover property acquired after the separation and to allow partition on separation, even when immediate divorce is not anticipated.[36] A case from the Waco court[37] involved a par-

[32] Tex. Ins. Code Ann. § 3.62 (1951).

[33] Mathews v. Mathews, 414 S.W.2d 703 (Tex. Civ. App. 1967). *See also* Counts, *Trust Income—Separate or Community Property?*, 30 Texas B.J. 851 (1967); Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 Texas L. Rev. 860 (1966).

[34] Tex. Rev. Civ. Stat. Ann. art. 4639 (1960).

[35] 76 Tex. 390, 13 S.W. 324 (1890). *See also* Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Baylor L. Rev. 20 (1967).

[36] Speckels v. Kneip, 170 S.W.2d 255 (Tex. Civ. App. 1942) *error ref.*; Corrigan v. Gross, 160 S.W. 652 (Tex. Civ. App. 1913) *error ref.*; *contra*, George v. Reynolds, 53 S.W.2d 490 (Tex. Civ. App. 1932) *error dismissed*. The latter case was based on two earlier authorities; in neither is it said whether the court was dealing with a separation agreement, though in the earlier case it may have been. Protzel v. Schroeder, 83 Tex. 684, 19 S.W. 292 (1892); Brokaw v. Collett, 1 S.W.2d 1090 (Tex. Comm'n App. 1928). *Raines v. Wheeler* was not cited in *Protzel*, which was decided only two years later, and that decision seems to have turned on the inherent unfairness of the agreement between the husband and wife and some arguments derived by analogy from the terms of what was to become of Tex. Rev. Civ. Stat. Ann. art. 4610 (1960).

[37] Zax v. Coast Properties Co., 411 S.W.2d 370 (Tex. Civ. App. 1967) *error ref. n.r.e.* In

tition agreement on separation arising under the old law of disability of coverture of a married woman. There the wife and her children owned all of the shares of a corporation. After the husband and wife were married, the husband was employed under an employment contract. The husband was discharged and brought suit against the corporation for wrongful termination of employment. To settle this litigation the corporation agreed to reparations by way of a cash settlement and a note. This agreement was endorsed by all the corporate stockholders including the wife, who in the meantime had separated from her husband. In anticipation of divorce the husband and wife entered into a property settlement agreement in which the wife renounced any claim to the proceeds of the settlement between the husband and the corporation; the settlement agreement recited that the wife was a guarantor on that agreement. Following the divorce, part of the note was paid and then the corporation defaulted. The husband assigned the note to a third person who brought suit against the corporation and the guarantors for the deficiency. Judgment was rendered against all the defendants and the wife appealed claiming disability of coverture. The trial court found that the agreement between the husband and the corporation was executed after the husband and wife were separated, that the wife executed the instrument for the benefit of her separate property corporate interest, and that the husband would not have accepted the note without his wife's signature. The appellate court concluded that since the wife was under disability of coverture when she made the contract, it was voidable, but, later execution of the property settlement constituted a ratification of the contract. In addition, the court held that the defense of coverture was not available since the endorsement was "in connection with and incident to" the wife's separate property.[38]

another case involving disabilities of coverture a nice question of characterization is raised. It is not easy to discern the facts precisely, the nature of the pleadings, the arguments or the holding in Wing v. Houston Nat'l Bank, 413 S.W.2d 843 (Tex. Civ. App. 1967) *error ref. n.r.e.* These seem to have been the facts: In 1962 the defendant and the son gave a bank two notes for a loan. These notes were later consolidated in a single note made by the defendant alone. The bank later sold the note to another bank as guardian of the estate of the husband. Without commenting on the propriety of the investment on behalf of the husband's estate, it may be noted that the bank promptly brought suit on the note and for interest, attorney's fees and costs. The defendant asserted that since a large portion of the loan funds were paid to the wife with the plaintiff-guardian's notice, that much (or at least half of it) should be treated as repayment of the note since the wife received it as community property. Evidence also showed that the money paid to the wife constituted a repayment to her of advances made on behalf of a joint venture engaged in between her, the son and the defendant. The defendant's argument as to the wife's receipt of a portion of the loan as community property is irrelevant as to that received as reimbursement for advancements and the court apparently found that all money received by the wife was of this character. Even assuming that the wife made a loan of community property to the defendant as the husband's agent and the defendant later borrowed more money from the husband and used it to repay the first loan, the defendant could scarcely argue that he is not fully liable on the second loan merely because he repaid the first. Secondly, the court argued that the money advanced by the wife (and restored to her) was presumptively her separate property and therefore when returned was separate property from which the husband could derive no benefit. Though the cited authority, Watson v. Beaty, 370 S.W.2d 790 (Tex. Civ. App. 1963) *error ref. n.r.e.*, does not support this proposition, substantial justice may be seen in the court's conclusion that when a married woman under disabilities of coverture makes substantial loans and has separate property, those loans and the repayment thereof may be deemed to be of her separate estate. There would, however, seem to be some substance in the defendant's argument that if money was received by the wife over and above the advances made by her (if supported by proper pleadings and evidence), it constituted receipt of community property.

[38] 411 S.W.2d at 373. This latter ground is somewhat dubious, however. The court cites Archer

One does not often encounter a separation agreement so terse and poignant as that in *Callicoatte v. Callicoatte*.[39] This was an action by the husband against his former wife and a third person for partition of three tracts of land, one (tract *C*) having been sold by the wife to a third person and the other two (*A* and *B*) still in her possession. The wife asserted that the three tracts had become her separate property by way of a partition of the community estate on separation, two tracts (*A* and *B*) as a direct result of the partition and one (tract *C*) as a future acquisition covered by the agreement. The facts supporting this assertion are best rendered in the words of the court.

> Defendant Jewell Callicoatte testified that on the night of May 23, 1955 at about 11:00 o'clock, plaintiff got up out of bed and said he was leaving. She further testified she asked him what he was going to do about the mortgage, ($4,500 on tracts *A* and *B*), and that he said all he wanted was the new car, which was paid for, and his clothes and his tools, and that Jewell could take care of the mortgage if she wanted to; that plaintiff didn't care anything about those.[40]

That was the partition agreement. The court held that the rule in *Rains v. Wheeler*[41] allowed a parol partition and hence covered tracts *A* and *B* which were in existence at the time of the agreement. The court, however, did not go on to infer that the partition agreement impliedly covered the earnings that each spouse would later acquire. Tract *C* had been acquired with the wife's subsequent earnings after the separation. With respect to this tract the court supported the grantee's title on the ground that if it was community property an abandoned wife might properly sell it.[42] The result would not be changed under the current law.[43] In revising article 4617 to provide for rights of an abandoned spouse as well as other "unusual circumstances" of marriage, the revisors were careful to make the proceedings for relief thereunder cumulative of existing laws and hence their use is not necessary if, as here, existing law already allowed an abandoned spouse to give good title to the community estate otherwise subject to the management of the abandoning spouse.

Far and away the most significant case affecting the division of property upon divorce is *Francis v. Francis*.[44] There a husband and wife anticipating divorce entered into a property settlement agreement in which the husband

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v. Griffith, 390 S.W.2d 735 (Tex. 1964); Cauble v. Beaver-Electra Ref. Co., 115 Tex. 1, 274 S.W. 120 (1925). Though an inference may be drawn from the later case that the earlier one accurately stated the law in effect in 1959 when the contract there in issue was made, the court failed to consider the consequences of the 1957 revision of article 4614 which may very well have greatly curtailed the wife's management powers between January 1, 1958 and August 23, 1963. *See* McKnight, *supra* note 14, at 336-37. *See also* Howell, *Attorney's Fee Agreements in the Supreme Court*, 29 TEXAS B.J. 809 (1966).

[39] 417 S.W.2d 618 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[40] *Id.* at 621.

[41] 76 Tex. 390, 13 S.W. 324 (1890).

[42] The court based its decision on Chester v. Breitling, 88 Tex. 586, 32 S.W. 527 (1895); Cheek v. Bellows, 17 Tex. 613 (1856); Keys v. Tarrant County Bldg. & Loan Ass'n, 286 S.W. 593 (Tex. Civ. App. 1926).

[43] TEX. REV. CIV. STAT. ANN. art. 4617 (Supp. 1967).

[44] 412 S.W.2d 29 (Tex. 1967), *noted in* 5 HOUS. L. REV. 350 (1967). For further discussion, see Smith, *Family Law*, this *Survey*, at footnote 73.

agreed to pay the wife a lump sum of $15,000, for which he gave a note, in consideration of the wife's relinquishing all rights, title and interest in and to the property of the husband. The first $7,500 was to be paid regardless of the wife's marital status; the remaining $7,500 was due only if she remained unmarried. After paying one-half of the note the husband filed suit for a declaratory judgment to declare the note void as alimony. The trial court found as a fact that at the time of divorce the husband received all the community property and held that the agreement, the note and the divorce court's judgment approving the agreement were valid. The court of civil appeals, without considering the general validity of the agreement and the note, declared that the portion of the judgment approving payment of $7,500 contingent on the wife's non-remarriage was void as a provision for alimony. By way of working an enormous practical change in Texas law, the supreme court first pointed out that alimony is properly defined as an allowance payable by the husband to the wife, made by court order in a divorce proceeding. A mere contractual obligation of one spouse to make future periodic payments to the other after divorce is not within that definition. Hence such an obligation does not violate public policy and is enforceable. Mere "approval" of such an agreement by the divorce court without more is proper.[45] The court specifically overruled the holding in *McBride v. McBride*[46] that an agreement to make periodic payments is void in itself. However, if the divorce court had ordered payment in installments, there is a clear indication that the order would not have been valid because only temporary alimony is allowed by court order.[47] It is important to note that the court's opinion does not turn on the refusal of the court to look behind the terms of the agreement as a "property agreement" but rather the court's willingness to give such an agreement effect if it can stand as a valid contract. The court emphasized that only a valid contract would be enforceable and stated that "Obligations of this type may be void or unenforceable for other reasons but none are urged here . . . ."[48] One may surmise the court means that such con-

[45] *Id.* at 33.

[46] 256 S.W.2d 250 (Tex. Civ. App. 1953).

[47] *See* McKnight, Book Review, 11 Sw. L.J. 272, 274 (1957). The only kind of alimony known when the original statutory provisions were enacted was that which provided for support pending divorce. Alimony payable after divorce later became common in other states but was not adopted in Texas.

The courts also commented on several miscellaneous aspects of divorce practice involving the powers of divorce courts. In Farrell v. Farrell, 407 S.W.2d 847 (Tex. Civ. App. 1966) *error ref. n.r.e.*, the husband during marriage conveyed real property to his wife as her separate property. In their divorce action the property was awarded to the husband. One ground of the wife's appeal was based upon this divesture of her title but the trial court's judgment was affirmed without specific mention of the separate realty. The supreme court dismissed the writ of error for want of jurisdiction since the court of civil appeals had not specifically mentioned this point. The wife later brought this trespass to try title action claiming that the divorce court had no power to divest her of title to her separate realty. The second suit was properly dismissed as the question was res judicata despite the fact that the divorce court had no power to divest her of separate realty. In another case the Fort Worth court held that the trial court's action in vesting the wife with title to the cash surrender value of an insurance policy on the husband's life rather than giving her judgment for its value was a matter of substance which therefore could not be corrected by a *nunc pro tunc* order after the divorce became final. Scott v. Scott, 408 S.W.2d 135 (Tex. Civ. App. 1966) *error dismissed.*

[48] 412 S.W.2d at 33.

tracts would be invalid if entered into for the purpose of buying a divorce, or if specially pleaded, for failure of consideration or for fraud or duress.

In *Cornell v. Cornell*[49] the husband attacked a property settlement providing for periodic payments which had been approved by the Texas divorce court. The husband claimed the judgment constituted an award of alimony and was therefore invalid. The wife pleaded that a decision of a California court in a suit brought by the husband raising the same question was res judicata. The Texas Supreme Court merely held that the California judgment holding that the agreement was not alimony was res judicata. But even if the California court had held that the agreement was one to pay alimony, it is submitted that the agreement, if a valid contract, would have been enforceable against the husband.[50]

Several cases involved dealings between third parties and a spouse pending divorce. In *Fannin Bank v. Blystone*[51] when the wife instituted divorce proceedings the husband was enjoined from encumbering or disposing of

[49] 413 S.W.2d 385 (Tex. 1967). Two other cases dealt briefly with property settlement situations. In one the Waco court held that property settlement agreement partitioning the community estate is governed by the law of contract and is not subject to later modification based on the change of the husband's financial circumstances. Cocke v. Cocke, 408 S.W.2d 348 (Tex. Civ. App. 1966) *error dismissed w.o.j.* In a case before a Dallas court a property settlement agreement had been entered in open court, transcribed by the court reporter and approved by the trial court. The court held such an agreement proper. O'Benar v. O'Benar, 410 S.W.2d 214 (Tex. Civ. App. 1966) *error dismissed w.o.j.*

[50] Two divorce cases involved foreign judgments, in each instance a Nevada decree. In Allis v. Allis, 378 F.2d 721 (5th Cir.), *cert. denied*, 389 U.S. 953 (1967), the husband and wife submitted themselves to a Nevada court for divorce. The court also adjudicated title to personalty and certain Texas realty which it found to be the husband's separate estate. On the property adjudication the wife appealed. On her return to Texas and while the matter was still on appeal in Nevada, the wife commenced an action in a Texas court for further adjudication of title claiming that the realty and personalty was the community property of the spouses. The case was removed to federal court on the basis of the husband's diversity of citizenship. The court promptly granted summary judgment for the husband with respect to the personalty on the basis of the Nevada judgment and, after the Nevada Supreme Court dismissed the wife's appeal, the federal court entered summary judgment for the husband as to the Texas realty. The Court of Appeals for the Fifth Circuit affirmed on the ground stated in McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961), that (1) a single court must adjudicate these matters in interstate, land-holding divorce cases and (2) since the parties had submitted themselves to the Nevada court's jurisdiction, its in personam judgments affecting title to Texas realty would be enforced as a matter of comity. A somewhat garbled instance of full faith and credit is found in Burleson v. Burleson, 419 S.W.2d 412 (Tex. Civ. App. 1967). There the husband challenged the jurisdiction of a Nevada court which granted a divorce to his wife on the ground that the wife had fraudulently asserted to the court that she was a bona fide resident of Nevada. The husband had commenced his action for divorce against the wife in Texas and she had answered in the Texas case with a general denial several months before she filed her action in Nevada. Following her Nevada divorce, the wife filed an amended answer and counterclaim in Texas alleging the Nevada divorce as a defense to her husband's petition and seeking affirmative relief by way of partition of the community property and declaration of the validity of the Nevada decree. More than six months after the Nevada judgment was entered, the husband challenged the jurisdiction of the Nevada court in his answer to the wife's counterclaim. The Nevada rule is that challenge of its jurisdiction on the basis of fraud, misrepresentation or other misconduct must be made within six months of the rendition of judgment. In overruling the trial court's finding that the Nevada divorce was void, the appellate court held that under the principle of full faith and credit the husband could not assert lack of jurisdiction in the collateral suit if he was barred from making that claim in a Nevada court. Since the husband would have been barred from making that claim in the Nevada court by its six months limitation, the appellate court upheld the validity of the Nevada divorce and remanded the case to the trial court for a division of the community property. Though the court was in error with respect to full faith and credit, it made no difference to the outcome as the trial court still had jurisdiction with respect to property division anyway. For further discussion, see VanDercreek, *Texas Civil Procedure*, this *Survey*, at footnote 38.

[51] 417 S.W.2d 502 (Tex. Civ. App. 1967) *error ref. n.r.e.*; *cf.* Chaudoin v. Claypool, 25 P.2d 1036 (Wash. 1933).

community property. The husband, nevertheless, executed a mortgage on certain community property. Following foreclosure and sale, the husband sued the mortgagee and the purchaser to set aside the entire transaction. The wife intervened in this suit asserting that the mortgage was executed in fraud of her rights. The only issue presented by the mortgagee and purchaser on appeal was whether the purchase was bona fide. Neither side seems to have relied on article 4634[52] which provides that transfers made by the husband in fraud of the wife are void. Nor did either side mention article 6640,[53] the *lis pendens* statute. In affirming the trial court's decision in favor of the wife, who had been awarded the land by the divorce court, the court of civil appeals based its holding on the *lis pendens* effect of article 4634. The fact that a divorce action is pending against the husband was held to put those dealing with him on notice of the suit. This was indeed the rule at common law and that applicable to the facts in all cases relied on by the court. But the common law rule was superseded in Texas by the enactment of article 6640 in 1905 requiring that notice of a suit with respect to property be filed in the county of its location in order to put the bona fide purchaser on constructive notice. In the present case this does not appear to have been done. It appears therefore that the court was in error in its assertion that article 6640 was inapplicable. The rule adopted by the court puts an intolerable burden on prospective purchasers who would have to check not only the *lis pendens* list in the county where the property is located but also the pending divorces in every county in the state before they could safely deal with any seller.

In *Ex parte Harvill*[54] the wife sued the husband for divorce in a district court and joined two third party defendants as alleged recipients of fraudulent conveyances of community property from the husband. A divorce was granted and a fraudulent conveyance by the husband to one of the other parties was set aside. A receiver of the community property was appointed, but a non-party who was in possession as lessee refused to yield possession of realty to the receiver. This non-party was, however, counsel for the fraudulent grantee. The receiver brought contempt proceedings against the attorney-lessee, who was fined and jailed for three days and further until he should purge himself by giving possession to the receiver. The attorney brought a writ of habeas corpus. The court concluded that since the attorney was not a party to the action he had been denied due process. That the attorney was presumed to know of the judgment against his lessor by way of being his lessor's counsel did not bind him on the judgment.

Under the expanded jurisdiction of domestic relations and juvenile courts accomplished by enactment of the Family Courts Act at the last session of the legislature these courts have jurisdiction over the property rights of third parties.[55]

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[52] TEX. REV. CIV. STAT. ANN. art. 4634 (1960).

[53] *Id.* art. 6640. One may conjecture that the facts giving rise to several of the cases cited by the court may have prompted the enactment of this statute in 1905.

[54] 415 S.W.2d 174 (Tex. 1967).

[55] TEX. REV. CIV. STAT. ANN. arts. 2338-3, 2338-7 - 2338-11a, 2338-13 - 2338-20 (Supp.

III. MANAGEMENT OF COMMUNITY PROPERTY

Prior to 1913 the husband was the manager of the community and the provision in what was, before January 1, 1968, article 4619[56] that it was subject to his sole disposition could be relied on as accurate statement of the law. In 1913, however, the legislature adopted a system of divided management of the community, though the provision with respect to the husband's dispositive power (so limited) was retained.[57] Provisions for the wife to manage her earnings and the income from her separate property were included and exemption provisions were inserted by which this property, and similar property of the husband, was not subject to debts contracted by the other spouse. As a result of the effort to make income from separate property separate in the 1925 revision, the provisions referring to the wife's management powers were omitted as superfluous and the husband's dispositive powers again appeared to loom larger. But after the judicial conclusion that the separate property reform was unconstitutional,[58] management provisions in the wife's favor were inferred by the courts from the exemption statutes which protect her earnings and the income from her separate property from debts incurred by the husband. Cases involving over-extensive assertion of the husband's management powers

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1967). The Attorney General has ruled that the amendment also empowers the domestic relations court to issue writs in title and liens suits involving realty and to enforce them. TEX. ATT'Y GEN. OP. No. M-137 (Sept. 28, 1967). In two cases arising under the old provisions of TEX. REV. CIV. STAT. ANN. art. 2338-11 (1960) the two Houston appellate courts seem to have viewed the jurisdiction of the Harris County Domestic Relations Courts No. 2 and No. 3 differently though both are governed by the same statute. In Rose v. Hatten, 417 S.W.2d 456 (Tex. Civ. App. 1967), the wife had sued the husband for divorce in Domestic Relations Court No. 2 and joined other parties as defendants who claimed property interests contested between the parties, among them a patent in which one of the additional defendants claimed equitable title. That defendant answered but the others did not. The trial court held that the patent was the community property of the husband and wife. The husband then filed suit for mandamus against the judge to proceed to judgment on all the issues and with the respect to all the parties. The new Houston court concluded that the domestic relations court lacked jurisdiction to adjudicate a property dispute between the husband and wife and third persons but by "disposing of all the property before the court and partitioning it to the [spouses], the court's judgment by implication disposed of any claim of third parties to such property"—an obviously erroneous conclusion. *Id.* at 458.

A related issue was litigated in Domestic Relations Court No. 3 in Roberson v. Roberson, 420 S.W.2d 495 (Tex. Civ. App. 1967) *error ref. n.r.e.*, where a third party sought to intervene in a divorce action between a husband and wife. After his action for divorce was dismissed, the husband brought an *ex parte* action in Mexico and, on receiving a favorable judgment, purported to remarry. On getting word of all this the first wife brought an action against the husband and got a declaratory judgment that their marriage was still subsisting. The new "wife" was apparently not a party to this action. Several years later the wife brought an action for divorce and a special master was appointed to untangle, *inter alia*, complicated facts with respect to property accumulated since the declaratory judgment. After the master had held numerous hearings and was well on his way toward a solution, the new "wife" sought to intervene to assert her rights as a putative wife. The court rejected her intervention and was sustained in this ruling by the appellate court on the grounds, apparently, that her plea in intervention was not timely filed and that she was not a necessary party. The appellate court seems to proceed on the assumption that the trial court had jurisdiction to allow the intervention. But even on this assumption, under the circumstances the trial court does not seem to have exceeded a proper exercise of its jurisdiction. The same court had already held in Carlson v. Johnson, 327 S.W.2d 704 (Tex. Civ. App. 1959), in a different context that the act creating the two domestic relations courts in effect gave them concurrent jurisdiction with district courts in domestic relations matters.

[56] TEX. REV. CIV. STAT. ANN. art. 4619 (Supp. 1967).

[57] Tex. Laws 1963, ch. 32, § 1, at 61.

[58] Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950); Hawkins v. Britton State Bank, 122 Tex. 69, 52 S.W.2d 243 (1932).

continue to occupy the courts. In one recent case[59] the husband had apparently abandoned his wife and made a new home with another woman for over eight years prior to his death. He had two insurance policies in which he had named this woman as his beneficiary. After first rendering summary judgment on behalf of the putative, or common-law, wife against the living, first wife with respect to the insurance proceeds, the court discovered *Brown v. Lee*.[60] In remanding the court concluded that since the policy would be community property of the husband and his living wife, if they were still married, an issue of fraud on the wife might be raised by the husband's action in naming the putative wife as beneficiary.

A much more important case involving fraud on the wife arose with respect to the husband's dealings designed for her protection and tax savings for the community estate. In *Marshall v. Land*[61] now before the supreme court on writ of error, the husband without knowledge of the wife purported to transfer substantial community assets in trust with power in the husband to control the operation of the trust, to receive all income and to revoke the trust during his life. Upon the death of the husband the trust was to provide income to the wife for life with remainders over. After the husband's death the wife asserted in her action against the trustee and remaindermen that if the inclusion of her share of the community estate in the trust was allowed to stand, she would be deprived of her community interest in the property by an ineffective *inter vivos* gift or an invalid testamentary disposition. The wife also asserted that if the husband had disposed of her community share, the disposition constituted a fraud on her community interest as a matter of law. The Dallas court held that this was an attempted testamentary disposition of community property, which was invalid since neither spouse has the right to dispose of the other's interest in their community property. Nor could it be a completed gift *inter vivos* since the donor retained the right to use, control and enjoy the property during his lifetime. Because of this conclusion, the court found it unnecessary to rule on the wife's assertion that the husband's disposition of the community property was excessive and capricious. In effect the court reached that conclusion, however, when it went on to find that, though there was no intentional fraud on the part of the husband, his attempt to make a testamentary disposition of the wife's community property constituted a constructive fraud. There was no contest with respect to the essential validity of the trust insofar as it was made up of the husband's share of the community.[62] By not attacking that part of the trust and not being put to an election, it seems that the widow would receive the income from the trust made up of the husband's share as well as taking her community share of the corpus outright.[63]

[59] Alexander v. Alexander, 410 S.W.2d 275 (Tex. Civ. App. 1966). For further discussion, see Davis, *Insurance Law*, this *Survey*, at footnote 62.

[60] 371 S.W.2d 694 (Tex. 1963).

[61] 413 S.W.2d 820 (Tex. Civ. App.), *error granted*, 11 Tex. Sup. Ct. J. 35 (1967). For further discussion, see Hemingway, *Wills and Trusts*, this *Survey*, at footnote 70.

[62] The court commented on the "illusory" quality of the trust, however.

[63] If the wife does not contest the validity of one-half of the trust, as was the case with respect to the insurance trust in Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958),

In another rather unusual case[64] the consequences to third persons of the husband's sole right to manage general community property were demonstrated. There the court held in a trespass to try title action that the representations of the seller's wife to the buyer were inadmissible to show the location of a boundary of the land conveyed. The court based its decision on the fact that the wife is not the general agent of the husband as manager of the general community and therefore the husband is not bound by her representations as to the dimensions of the property. The contrary result could only be reached in the case of an ordinary partnership. The marital interest in community property is not akin to the interest in partnership for purposes of management. After January 1, 1968, community property that is mixed or commingled is subject to the spouses' joint (not several) management, and neither will be subject to the representations of the other.[65]

Though the 1963 statutes passed by the legislature gave married women complete power to sue and be sued,[66] nothing was said of their right to manage personal injury recoveries, their exclusive right to sue in that regard, or the exemption of such recoveries from debts incurred by the other spouse. In a recent case before the Dallas court,[67] it was asserted that because the wife could bring such an action, the husband could not. The court rejected this argument reasoning that the husband's power to sue rests on his power to manage recoveries even though the wife might also bring such an action.[68] The husband's power to manage recoveries for injuries to the wife was changed by the 1967 legislation which puts sole power of suit in such instance in the injured wife, makes her sole manager of the recoveries, and makes the recoveries exempt from the non-tortious liabilities of the husband.[69] The husband might, however, bring such an action as the wife's representative or agent.

One of the objectives of the 1963 legislation was to give married women complete contractual capacity and to repeal the requirement of a married woman's separate (privy) acknowledgement for the validity of her conveyances. Though article 1299[70] requiring the wife's separate acknowledg-

the wife will incur a gift tax liability as to her community half. *See also* Gordon v. United States, 263 F. Supp. 768 (W.D. Tex. 1967); REV. RUL. 67-383, 1967 INT. REV. BULL. No. 44, at 18.

[64] Miller v. Fitzpatrick, 418 S.W.2d 884 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[65] TEX. REV. CIV. STAT. ANN. art. 4621' (Supp. 1967).

[66] *Id.* art. 4626.

[67] Grace v. Starrett, 411 S.W.2d 774 (Tex. Civ. App. 1967) *error ref. n.r.e.*

[68] *Cf.* Connell v. Rosales, 419 S.W.2d 673 (Tex. Civ. App. 1967). The husband and wife complained of emotional pain and physical illness suffered by the wife, as well as the husband, as a result of unreasonable collection efforts on the part of the defendant. These injuries occurred in 1958-1959; the court held that the lump sum recovery is general community subject to the husband's management and the husband alone might sue for the recovery thereof.

[69] TEX. REV. CIV. STAT. ANN. arts. 4615, 4620, 4621 (Supp. 1967). In J. A. Robinson Sons, Inc. v. Ellis, 412 S.W.2d 728 (Tex. Civ. App. 1967) *error ref. n.r.e.*, involving a wrongful death action, a verdict was rendered for the plaintiff-widow and she thereafter remarried. The second husband was not a party to the action. The wife's action arose, therefore, before her second marriage. The defendant, apparently wishing to show some relationship between the wife and the second husband that would indicate estrangement from the first husband whose wrongful death was in issue, sought to bring in the second husband as a party in the hope that damages might be reduced by evidence which might be brought out. The court held, however, that TEX. R. CIV. P. 157 allowing such joinder of parties refers only to a situation when marital status is changed before completion of a trial not afterwards.

[70] TEX. REV. CIV. STAT. ANN. art. 1299 (1962).

ment for a valid conveyance was repealed, articles 6605[71] and 6608[72] requiring the wife's separate acknowledgment for proper recordation were allowed to stand. In its per curiam refusal to grant a writ of error in *Diamond v. Borenstein*,[73] the supreme court stated that the result of the 1963 statute repealing article 1299 was that a married woman's separate acknowledgment was no longer necessary to the essential validity of her conveyance of non-homestead separate property. The court went on to state that compliance with the form specified in articles 6605 and 6608 was nevertheless required for purposes of notice and recordation. Articles 1300,[74] 6605 and 6608 are repealed as of January 1, 1968, which should remedy the recordation problem.[75]

It should be noted that the new article 4620[76] has the effect of allowing married women to be partners or participants in joint ventures. This change overrules the old cases to the contrary which were most recently cited with approval in *Flint v. Culbertson*.[77] The underlying rationale of the old rule was that if a married woman was allowed to be a partner, she and the partner would thereby acquire management powers over some community property to the improper exclusion of her husband. Since after January 1, 1968 the husband is excluded by law from managing income produced from the wife's separate property or her earnings and the income from such property and earnings and its mutations, a married woman can freely enter into a partnership without raising this objection.

IV. Liability of Community Property

The San Antonio court recently held the wife liable for a debt contracted to maintain property which became her separate estate under a separation agreement.[78] The court seems to have reached this decision on the basis of the time the bill was presented for payment rather than the time the contract was entered into. The husband and wife had entered into a separation agreement which was incorporated in their divorce decree. One of the terms of the agreement was that the husband would discharge all community debts. After their divorce the former husband sued his former wife to recover various sums paid by him. One of these debts, a bill for services, had been presented to the wife after the separation agreement was entered into. It is not stated whether the services (for repair of a well) were rendered before or after the execution of the agreement. The well was located on what had been community property but became the wife's separate property under the separation agreement.[79] The court held that the

[71] *Id.* art. 6605 (1960).
[72] *Id.* art. 6608.
[73] 414 S.W.2d 454 (Tex. 1967), *noted in* 5 Hous. L. Rev. 172 (1967), 21 Sw. L.J. 396 (1967). *See also* 18 Baylor L. Rev. 158 (1966).
[74] Tex. Rev. Civ. Stat. Ann. art. 4610, § 6 (Supp. 1967).
[75] Tex. Laws 1967, ch. 309, § 1, at 735.
[76] Tex. Rev. Civ. Stat. Ann. art. 4620 (Supp. 1967).
[77] 159 Tex. 243, 319 S.W.2d 690 (1958).
[78] Morgan v. Morgan, 406 S.W.2d 347 (Tex. Civ. App. 1966).
[79] The fact that there was disagreement over the subject would seem to rebut the inference that the repair was a necessary when performed. The only reasonable inference is that the contract was made by the wife as the husband's agent for repair of what became her separate property.

separation agreement was effective before the bill was presented and hence the husband was not liable for it. Further, since the property concerned was the wife's separate property when the bill was presented, the court held that the debt was a separate obligation; therefore, the husband was not held liable for its payment under the "community debt" provision of the separation agreement. The court appears to be engaged in a sort of marshalling, a just recourse under the circumstances. In 1967 the legislature enacted a marshalling statute, the new article 4624,[80] which makes this remedy more obviously available. Following the 1967 amendment a court may properly hold in a case of this sort that since the wife as well as the community was liable on the contract, the creditor had properly exercised his choice in billing the wife,[81] and therefore, primary liability for payment should rest on her rather than her husband.

In another case[82] a judgment was recovered against a widow as independent executrix of the estate of her husband on a community debt which had been incurred by the husband. The creditor then levied execution on what had been community estate of the husband and wife. The widow sought an injunction against the levy on the ground that since she was not *individually* a party to the suit, levy could not be had against her one-half interest in the property. The court, however, concluded that the community property passed charged with debts against it, and under section 146[83] of the Probate Code the independent executrix is directed to pay claims against the estate. In *Lawrence v. United States*[84] however, the Internal Revenue Service once again failed[85] in its efforts to proceed against property of the wife for satisfaction of taxes due from the husband. The court granted the wife an injunction against collection of a deficiency for excise taxes levied against the husband when the Internal Revenue Service proceeded against her property other than that held as executrix or sole beneficiary of the husband.

The earnings of the wife (if not reinvested) have been protected since 1913 for recovery of debts contracted by the husband.[86] In *La Rue v. Briggs-Weaver, Inc.*[87] the husband's judgment creditor garnished the bank in which the wife had an individual account. The debt underlying the garnishor's 1960 judgment was incurred by the husband in a community business venture. Deposits in the account from 1962 to 1966 were those of the wife's earnings. Although there had been an initial deposit in the account of $250 which was transferred from the couple's joint account in

[80] TEX. REV. CIV. STAT. ANN. art. 4624 (Supp. 1967).

[81] The doctrine of creditor's choice still prevails if the statute is not plead, however.

[82] Alamo Candy Co. v. Zacharias, 408 S.W.2d 517 (Tex. Civ. App. 1966).

[83] TEX. PROB. CODE ANN. § 146 (Supp. 1967).

[84] 265 F. Supp. 590 (N.D. Tex. 1967). *See also* Mulcahy v. United States, CCH 1968 STAND. FED. TAX REP. (68-1 U.S. Tax Cas.) ¶ 9159 (5th Cir. Jan. 10, 1968), where property subject to the husband's management, control, and disposition was involved.

[85] Other cases include Preston v. Campbell, 67-1 U.S. Tax Cas. ¶ 9163 (Nov. 14, 1966); Mulcahy v. United States, 251 F. Supp. 783 (S.D. Tex. 1964); Bice v. Campbell, 231 F. Supp. 948 (N.D. Tex. 1964); Helm v. Campbell, Civil No. 9043 (N.D. Tex., Sept. 6, 1962). *See* McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 Sw. L.J. 39, 49 (1967); *See also* Moore v. Hanson, 325 F.2d 784 (5th Cir. 1964).

[86] Moss v. Gibbs, 370 S.W.2d 452 (Tex. 1963).

[87] 413 S.W.2d 741 (Tex. Civ. App. 1967).

1962, the court seemingly treated this as disposed of by the *fifo* rule, since nothing other than the wife's earnings were ever deposited in the account thereafter and several hundred dollars had been withdrawn. The court held that the account was exempted from the husband's judgment-creditor's claim since the amount therein represented earnings of the wife and were not subject to garnishment for the husband's contractual or tortious liabilities under article 4616.[88] The court did not comment on the burden of proof with respect to different kinds of community property though under the 1967 statute this is likely to become a common problem.[89]

V. HOMESTEAD

Apart from recent examples of well-established though not particularly striking points in the homestead law,[90] a new example of the much criticized rule in *Rock Island Plow Co. v. Alten*[91] is found in *Aetna Insurance Co. v. Ford.*[92] In *Rock Island* the court distinguished the provisions protecting a business homestead from those protecting a residential homestead and held that only the business property itself and not property supporting its activities were protected. In *Ford* the husband and wife brought suit for an injunction against a creditor and the levying officer for the levy of execution on land claimed as their business homestead. The court of civil appeals applied the rule in *Rock Island* to the non-contiguous lots claimed as the business homestead and held one was merely ancillary to the other and since used merely "for the purposes" of the business, it was not exempt. The supreme court reversed, holding that "the business homestead exemption may extend to two non-contiguous lots when such lots are used as a place for the operation of the business of the head of a family, and both are essential to and necessary for such business, not merely being used in aid of the business."[93]

A more novel point was presented in *W & W Floor Covering Co. v. Project Acceptance Co.*[94] There the husband and wife negotiated with a contractor to build them a home. A mechanics' and materialmen's lien contract was properly executed to secure the note for the purchase price and was filed in the mechanics' and materialmen's records. Before maturity, the note was assigned by the contractor to the defendant. At the contractor's in-

[88] TEX. REV. CIV. STAT. ANN. art. 4616 (1960). Under the new article 4620 all community property is subject to tortious liability of either spouse. *Id.* art. 4620 (Supp. 1967).

[89] *Id.* art. 4621 (Supp. 1967) provides for three kinds of community property: that subject to the husband's management, that subject to the wife's management, and that subject to joint management.

[90] *E.g.*, that a partially valid mortgage of a homestead under a deed of trust executed in consideration for the payment of taxes and discharge of a mechanic's lien will support its sale under the deed of trust in the absence of tender by the spouses of the amount properly chargeable to the property, Lewis v. Investors Sav. Ass'n, 411 S.W.2d 794 (Tex. Civ. App. 1967), and that the sale of a business homestead to a corporation causes it to lose its homestead quality, Nash v. Conatser, 410 S.W.2d 512 (Tex. Civ. App. 1966).

[91] 102 Tex. 366, 116 S.W. 1144 (1909).

[92] 11 Tex. Sup. Ct. J. 178 (1968).

[93] *Id.* at 180.

[94] 412 S.W.2d 379 (Tex. Civ. App. 1967). For further discussion, see *Property*, this *Survey*, at footnote 62. *See also* Hayes, *Representing Homeowner Where Builder Fails to Complete: Insolvent Builder—Noncompletion*, 9 So. TEX. L.J. 65 (1967).

sistence the plaintiff supplied and installed floor covering and filed its lien on completion of the work. The contractor defaulted and the plaintiff then sued the contractor, the husband and wife, and the defendant to recover its debt and to foreclose its lien. The plaintiff had no contract with the husband and wife but relied on that part of article 5460[95] which provides that the contract between the owner and the contractor will enure to the benefit of those who furnish labor and materials to the contractor. Since the contractor had already transferred his lien to the defendant, the court held that it would not assist those who subsequently furnish labor or materials to the contractor. The result might have been different if the plaintiff had done the work at the insistence of the defendant (assignee of the lien) rather than the contractor. Under article 5469[96] the husband and wife are required to retain ten per cent of the contract price and if they had done so the plaintiff's lien would have attached to that. However the husband and wife had not done this, so there were no funds to which a lien could attach. The plaintiff's lien could not attach to the homestead because he had no contract with the spouses, and he could not get the benefit of the contract with the contractor because the defendant had acquired the contractor's note as a bona fide purchaser of a negotiable instrument. However, since the husband and wife had violated article 5469, while the plaintiff had complied with article 5453,[97] the plaintiff was held entitled to a money judgment against the husband and wife and the contractor to the extent of ten per cent of the contract price. In this case the plaintiff recovered his entire claim since it was less than the ten per cent and there were no other creditors. Had more debts been due, the creditors would have been required to share the ten per cent. The only way the plaintiff could have protected himself would have been to get a separate contract and lien for himself from the husband and wife. The case raises the further practical problem of how an individual or a couple here in the position of the husband and wife *could* comply with article 5469 in the light of their uneven bargaining position!

In another case[98] the husband bought a home prior to his marriage. The husband died a month and a half after the marriage and the equity in the home was little more than $500 while the mortgage indebtedness was $13,500. The husband devised the home to his two daughters by a previous marriage. The wife brought suit praying that the homestead be set aside to her with the lien indebtedness paid by the estate, or that she be paid a $5,000 allowance in lieu of the homestead as provided for in Probate Code section 273.[99] The trial court set aside the homestead to her subject to her paying the indebtedness against it. The majority of the appellate court held that either of the wife's alternative prayers might validly be granted but that the instant order was invalid since the wife was entitled to a homestead not so burdened with debt that she might be ousted by failure

[95] TEX. REV. CIV. STAT. ANN. art. 5460 (1958).
[96] *Id.* art. 5469 (Supp. 1967).
[97] *Id.* art. 5453.
[98] Ward v. Braun, 417 S.W.2d 888 (Tex. Civ. App. 1967).
[99] TEX. PROB. CODE ANN. § 273 (1956).

to make a mortgage payment. Justice Nye, concurring, stated that, while the wife may not be required to accept an unsuitable homestead, just because there is a lien against the property (though proportionally large), the homestead is not thereby made unsuitable as a matter of law. The trial court impliedly held the homestead suitable; in the view of Justice Nye, the majority of the court apparently felt that the homestead subject to a lien was rendered unsuitable as a matter of law.